THE HON'BLE MR JUSTICE P.S.NARAYANA

WRIT PETITION No.5242 of 2007

Date 05-10-2007

Between:
P.Shankar Reddy.

..... PETITIONER

AND

Indian Overseas Bank, Vijayanagar Colony, Hyderabad.

.....RESPONDENT

THE HON'BLE SRI JUSTICE P.S.NARAYANA

WRIT PETITION No.5242 of 2007

ORDER:

This Court issued Rule Nisi on 15.03.2007 and granted interim stay. Counter affidavit is filed along with W.V.M.P.No.1075 of 2007.

Heard the counsel.

Sri Rama Rao representing Sri Kancherla Raaja, learned counsel for the petitioner, states that in view of the fact that the Security Interest (Enforcement) Rules, 2002 (for short 'the Rules') have not been complied with, the proceedings are bad. The counsel also relied upon the decision of this Court in W.P.No.4914 of 2004 dated 12.03.2007.

Learned Standing Counsel representing the respondent-Bank, indeed, would maintain that the defect if any had been duly rectified.

Heard the counsel.

This Writ Petition is filed to declare the sale notice dated 16.02.2007, published in Eenadu daily newspaper on 23.02.2007, as illegal, arbitrary and violation of Article 300-A of the Constitution of India.

It is averred in the affidavit filed in support of this writ petition that pursuant to the application of the petitioner for availing housing loan, the respondent-Bank sanctioned loan of Rs.7,00,000/- on 18.11.2005 repayable in 180 monthly instalments at the rate of Rs.6,000/- per month commencing from the month of December, 2005. As the petitioner committed default in payment of monthly instalments, the respondent-Bank initiated proceedings under the Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act (for short 'the Act') for sale of

Flat No.203, Block No.5, New Maruthinagar, Kothapet, Ranga Reddy District, and subsequently, issued a demand notice on 23.10.2006 under Section 13 (2) of the Act. It is further averred that the respondent-Bank without waiting for 60 days, as required under Section 13 (2) of the Act, took possession of the property on 27.11.2006 and that the petitioner approached the respondent-Bank to repay the amount and requested to re-schedule the terms of repayment. Since the respondent-Bank orally assured that no further action would be taken provided that an amount of Rs.2,50,000/- is paid on or before 10.01.2007, the petitioner paid the said amount and the respondent-Bank having received the said amount, issued paper publication inviting to participate in open auction scheduled on 19.03.2007 and, therefore, the action of the respondent-Bank was illegal, arbitrary, and violative of Article 300-A of Constitution of India. It is averred that to show his bonafides, he had paid an amount of Rs.1,00,000/- totaling to Rs.3,50,000/- and thus, he has neither intention to evade the payment nor avoided to repay the amount but due to financial problems, he could not repay the instalments regularly. It is also averred that the provisions of the Act have no application to his case, since he had paid an amount of Rs.3,50,000/- out of the total liability of housing loan, that the provisions of the Act are applicable to the cases where the account of borrower was classified as Non-Performing Asset (for short 'NPA') and as on the date the bank issued notice under Section 13 (2) of the Act, the liability under the housing loan was Rs.66,000/- and, therefore, his account cannot be considered as NPA. It is also averred that the sale notice dated 16.02.2007 issued by the respondent-Bank, published in Eenadu Daily newspaper on 23.02.2007, wherein it was mentioned that the tenders would be opened on 19.03.2007. Rules 8 and 9 of the Rules would make it clear that where a bank seeks to sell the immovable assets of borrowers under the Act, it should issue thirty days notice

of sale to the borrowers and where the bank seeks to effect sale of such secured assets either by inviting tenders from the public or by holding public auction, publication of notices in two newspapers is mandatory. Rule 9 specifically provides that a minimum of thirty days shall expire from the date of publication of sale notice in newspapers before the bank proceeds with the sale subject to conforming with the other conditions stipulations thereunder. It is averred that in the instant case, the respondent-Bank had failed to strictly observe the condition i.e. publishing sale notice in newspapers and waiting 30 days thereafter before proceeding with the sale. Inasmuch as the mandatory provisions as ordained by the rules had not been followed, the petitioner had been filed the present writ petition.

In the counter affidavit filed on behalf of the respondent-Bank, it is stated that the petitioner borrowed a term loan of Rs.7,00,000/- for purchase of Flat No.203 in Khader Complex, Kothapet by deposit of title deeds and consequent upon the petitioner committing defaults in payment of principal debt and interest, his loan account was classified as Non-Performing Asset on 31.08.2006 in terms of the guidelines of the Reserve Bank of India. Despite repeated requests, the petitioner failed to repay the amount outstanding and, therefore, the respondent-Bank got issued a statutory notice dated 12.09.2006 under Section 13 (2) of the Act calling upon the petitioner to pay in full and final discharge of its liabilities aggregating to Rs.7,44,528/- along with interest within 60 days from the date of the said notice. As the petitioner failed to discharge the amount due even after the expiry of the statutory period of 60 days from 12.09.2006, the respondent-Bank took symbolic possession on 27.11.2006 by affixing the statutory notice on the premises. It is stated that, in the aforesaid circumstances, the respondent-Bank filed Crl.M.P.No.105/2007 on the file of Chief Metropolitan Magistrate at L.B.Nagar, R.R.District under Section 14

of the Act for taking physical possession of the property and, accordingly, the learned Magistrate appointed Advocate-Commissioner for taking physical possession of the property and subsequently, the respondent-Bank got published the Auction Notice under Section 13 (4) of the Act read with Rules 8 and 9 of the Rules in 'Eenadu' and 'The Hindu' dated 23.02.07/22.02.07 fixing the date of auction as 19.03.2007. It is further stated that since there was mistake on the part of the respondent-Bank in issuing the paper publication regarding giving less than 30 days time as prescribed, the respondent-Bank rectified the same by way of issuing a corrigendum published in 'Eenadu' and 'The Hindu' newspapers on 16.03.2007 fixing the date of auction as 27.3.2007. It is also stated that by virtue of that irregularity, the entire proceedings cannot be nullified and in this regard, the respondent-Bank placed strong reliance on the judgment of the Supreme Court reported in **Kishan Lal v. State of Jammu & Kashmir**[1], wherein it was mentioned that if a party can waive an objection, it is irregularity and if it is not, then it is nullity. It is further stated that the respondent-Bank issued notice under Section 13(2) of the Act, and after expiry of more than 110 days, the petitioner had paid the amount of Rs.3,50,000/-, and in terms of Section 13(8) of the Act and the guidelines issued by the Reserve Bank of India, the entire amount has to be discharged and as the petitioner had failed to pay the loan amount, he was declared as NPA on 31.08.2006. According to the respondent-Bank, since the amount was paid after issuance of statutory notice, there is no right for the petitioner to stall the proceedings, that it never assured to re-schedule the terms of repayment and in view of huge continuous losses caused to the Banks and Financial Institutions by the borrowers and taking advantage of the time consuming recovery process, the Securitisation Act was brought into existence. It is also stated that the petitioner after committing wilful default in payment of

instalments, that having been declared as NPA in terms of the guidelines of the Reserve Bank of India, that after initiation of the statutory proceedings under the Act only, instead of discharging the dues in full, he had paid the said amounts on different dates after expiry of 60 days time fixed under Section 13(2) notice. It is stated that the material facts had been suppressed. It is also stated that by misrepresentation, an Advocate's name, i.e "Sri B.Krishna Mohan, S.C. for IOB" is printed as Standing Counsel for the respondent-Bank and, in fact, no such counsel was there for the respondent-Bank and is having panel of advocates to represent before this Court. The respondent-Bank issued notice under Section 13(2) of the Act on 12.09.2006 but the petitioner suppressed the said fact and had misrepresented the date of notice as '23.10.2006', and as well as non-compliance with Rules 8 and 9 of the Act. Further a specific stand had been taken that the aggrieved party had an alternative remedy by way of appeal under Section 17 of the Act and without availing the said remedy, the petitioner had approached this Court and hence the writ petition is liable to be dismissed on that ground also.

This Court in W.P.No.4914 of 2007 while dealing with similar question observed thus:

> "The above contention does not commend acceptance by this Court. The legislative thrust and purpose of the provisions of the Rules 8 and 9 are many. At one level, the purpose is to sensitize the borrower of an impending sale, which is the culmination of the stringent measures of the legislation, so as to afford the borrower a final opportunity to redeem his property by repaying the debt. Rule 8(6) and Rule 9 of the Rules, in particular, serve other purposes as well. It is specifically provided that where the sale of the secured asset is effected either by inviting tenders from the public or by holding a public auction (Rule 8(6) proviso), the creditor must cause a public notice in two leading newspapers including one in the vernacular language having sufficient circulation in the locality. Coupled with the specific provisions of Rule 9 of the Rules, the statutory intent is that no sale of immovable property should take place before the expiry of thirty days from the date on which the public notice of sale is published in the

> newspapers. On an interactive analysis of Rules 8(6) and 9 of the Rules, the legislative purpose is discernable and clear. The statutory rule requires that there should be a sufficiently transparent and widely publicized process for sale of the property in question, so as to ensure wider public participation, to enable a competitive return for the secured asset. The underlying purpose appears to be to provide a check for any irrational, incompetent, collusive or nepotistic practices by the human component of a banking or financial institution in effecting sales by invitation of tenders in public auction without following such mandated period of notice and publication of the event of sale. Without such wider publicity and following the rigorous procedure mandated by the statutory provision, both the borrower and the secured creditor might stand to lose. At least, these twin objectives substrate the statutory prescription of Rule 8(6) proviso and Rule 9 of the Rules. Having regard to the impregnated public interest trajectory of these Rules, this Court is of the considered view that the provisions must be interpreted as mandatory being in the public interest."

In the light of the stand taken in the counter affidavit and in view of the order made by this Court in W.P.No.4914 of 2007 referred to supra, this Court is of the considered opinion that the sale notice dated 16.02.2007, which was published on 23.02.2007 in Eenadu daily newspaper, being not in conformity with the rules, the same is hereby set aside. But, however, the respondent-bank is at liberty to proceed further in accordance with the rules.

The Writ Petition is disposed of accordingly. No order as to costs.

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05-10-2005

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[1] 1994 (4) SCC 422